HONG LEONG FINANCE BHD

v.

STAGHORN SDN BHD & OTHER APPEALS

COURT OF APPEAL, KUALA LUMPUR
DENIS ONG JCA
MOHD SAARI YUSOF JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NOS: B-02-255-94, B-02-132-95, B-08-183-95]
5 MAY 2003

CIVIL PROCEDURE: *Appeal - Record of appeal - Direction of Court of Appeal to file and serve consolidated appeal record pursuant to Federal Court order - Whether direction compromised respondent's right to raise preliminary objection in relation to appeals - Whether effect must be given to Federal Court order*

This was an objection by the respondent on that part of the Court of Appeal order directing the appellants to file and serve a consolidated appeal record on the respondent pursuant to a Federal Court order. The respondent claimed, *inter alia*, that the said direction had the effect of: (1) transforming an irregular appeal record into one that was proper and regular; and (2) compromising the respondent's right to raise the preliminary objection in relation to the appeals herein in their original status.

The issue was whether the direction complained of should be vacated.

Held:
Per Denis Ong JCA

[1] The consolidation of the appeals ordered by the Federal Court was binding on the parties and the Court of Appeal. The court could not proceed to hear the appeals on the merits until the consolidated appeal record had been filed and served as directed. (pp 480 h & 481 a-c)

[2] The point taken by the respondent in relation to the filing and service of the consolidated appeal record was procedural in nature. Therefore, the objection likely to be taken by the respondent was purely technical. The consolidated appeal record, its filing and service, were steps necessary and proper to give effect to the Federal Court order. (p 481 d)

[3] Based on rr. 1A, 3A and 102 of the Rules of the Court of Appeal 1994 and the judgment of the Federal Court in *Megat Najmuddin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd*, the direction complained of should not be vacated. (p 481 e-f)

[Direction complained of not to be vacated but affirmed; hearing of the appeal consolidated by the Federal Court order adjourned to a date to be fixed.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah bantahan responden terhadap sebahagian perintah Mahkamah Rayuan yang mengarahkan perayu-perayu untuk memfailkan dan menyampaikan satu penyatuan rekod rayuan terhadap responden selaras dengan perintah Mahkamah Persekutuan. Responden menuntut, *inter alia*, bahawa arahan tersebut membawa kesan: (1) membetulkan rayuan yang tidak betul; dan (2) mengkompromi hak responden untuk membawa bantahan permulaan berkaitan rayuan-rayuan dalam kedudukan asal mereka.

Isunya adalah sama ada arahan tersebut patut dihapuskan.

Diputuskan:
Oleh Denis Ong HMR

[1] Penyatuan rayuan yang diarahkan oleh Mahkamah Persekutuan mengikat parti-parti dan Mahkamah Rayuan. Mahkamah tidak boleh mendengar rayuan-rayuan atas merit sehingga penyatuan rekod rayuan difailkan dan disampaikan seperti diarahkan.

[2] Bantahan responden berkenaan pemfailan dan penyampaian penyatuan rekod rayuan bersifat prosedur. Dengan itu, bantahan yang mungkin diambil oleh responden semata-mata teknikal sahaja. Penyatuan rekod rayuan, pemfailan dan penyampaiannya adalah langkah-langkah yang perlu diambil untuk menyempurnakan perintah Mahkamah Persekutuan.

[3] Berdasarkan kk. 1A, 3A and 102 Kaedah-kaedah Mahkamah Rayuan 1994 dan penghakiman Mahkamah Persekutuan di dalam kes *Megat Najmuddin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd*, arahan tersebut tidak boleh dihapuskan.

Arahan yang dibantahkan tidak dihapuskan tetapi disahkan; pembicaraan penyatuan rayuan ditangguh ke tarikh lain untuk ditetapkan.]

Case(s) referred to:

Co-operative Central Bank Ltd v. Feyen Development Sdn Bhd [1997] 3 CLJ 365 FC ***(refd)***

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal [2001] 2 CLJ 525 FC ***(refd)***

Megat Najmudin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd [2002] 1 CLJ 645 FC ***(refd)***

United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn Bhd (No 2) [1988] 3 MLJ 352 HC ***(refd)***

Legislation referred to:

Rules of the Court of Appeal 1994, rr. 18(4)(d), (7)

For the appellant (Civil Appeal Nos: B-02-255-94, B-02-132-95 & B-08-183-95) - J Kannaperan; M/s Shearn Delamore & Co

For the appellant (Civil Appeal Nos: B-02-138-95 & B-02-228-95) - Joginder Singh; M/s Joginder Singh & Co

For the respondent - Yusuf Khan (KL Wong); M/s Yusuf Lee Pathma & Marbeck

[Appeal from High Court, Shah Alam; Originating Summons No: 24-391-90 & High Court, Kuala Lumpur; Originating Summons No: S6-32-958-88]

Reported by Usha Thiagarajah

JUDGMENT

Denis Ong JCA:

The abovenamed appeals and two other related appeals were fixed for hearing before this panel (ie, Denis Ong, Mohd Saari and Alauddin Mohd Sheriff JJCA) for the first time in the week commencing on 31 July 2001. The two other related appeals were:

(a) **MRRS No: B-02-347-95**

Wong Bin Chen ... Appellant

v.

Staghorn Sdn Bhd ... Respondent

(b) **MRRS No: B-02-371-95**
Hong Leong Finance Bhd ... Appellant

v.

Staghorn Sdn Bhd ... Respondent

These eight appeals actually came on for hearing on 2 August 2001 starting with the appeal in (a) above followed by the appeal in (b). Both appeals were struck out upon the application of Mr. Joginder Singh and Miss J. Kannaperan, learned counsel for the respective appellants, to withdraw them. There were no objections from Mr. Yusuf Khan, learned counsel for the respondent, and no order was made as to costs. These two appeals were thus disposed of.

When the remaining six appeals abovenamed came on for hearing on the same day, Miss Kannaperan informed the court that she had three separate motions namely: encl. (15a) in MRRS No: B-02-255-94, encl. (12a) in MRRS No: B-08-183-95, and encl. (51a) in MRRS No: B-02-132-95 to be heard first. A feature common with all three motions was that they sought orders of this court to file supplementary appeal records to include in the cases of encls. (12a) and (51a) the order of the High Court at Shah Alam dated 17 April 1995 which *inter alia*, set aside its own previous order of sale dated 9 August 1991 and the auction sale so held on 16 November 1991 pursuant thereto in respect of land held under Certificate of Title 23316 Lot No: 1996 in the Mukim of Semenyih; and in the case of encl. (15a), an order of the High Court at Shah Alam dated 8 October 1994 which *inter alia*, ordered the Registrar of Titles or the Collectors of Lands, Selangor, Shah Alam to produce for inspection of the 2nd proposed intervener and for copies to be taken of C.T. 23316, Lot No. 1996; all documents relevant to Lien Holder's Caveat No: 4556/81 Jld 9 Folio 196 and its withdrawal; and all documents relevant and connected to Private Caveat No. 912/81 Jld 2 Folio 146 entered by N. Jegatheeson. The 3 motions asked for extension of time and leave of the court to file and serve the supplementary appeal records within seven (7) days of receipt of the sealed order of the High Court at Shah Alam.

The ground common to all these motions was the complaint of the respondent that the appeal records were bad in law for non-compliance with rr. 18(4)(d) and 18(7) of the Rules of the Court of Appeal 1994 (RCA) in that such appeal records did not have a sealed copy or a certified true copy of the orders appealed from. The appellant by their counsel deposed in the supporting affidavits to these motions that such complaint was not made before although the appeal had come before the Court of Appeal for hearing previously.

The respondent replied in their affidavits that there was a lapse of 5 1/2 years since filing of the notice and appeal records for which the appellant gave no explanation for the delay or inaction. In the result, they maintained that non-compliance with the mandatory Rules of the Court of Appeal renders the appeals incompetent which went to the jurisdiction, in that there is no proper appeal to adjudicate by this court.

At the hearing on 2 August 2001 before us Miss Kannaperan submitted first, introducing the three motions which she maintained were proper and cited *UMBC*'s case *United Malayan Banking Corporation Bhd v. Syarikat Perumahan Luas Sdn. Bhd (No. 2)* [1988] 3 MLJ 352 followed by Mr. Khan. He submitted that the appellant extracted the court order dated 27 April 1995 in 1995 itself and that a copy of the sealed order was in the appeal record at the Federal Court level. He prayed that the applications be dismissed adding that the fact that no objection was taken previously did not mean that special circumstances existed for leave to be granted. Miss Kannaperan then replied that firstly, when the appeal record of the present case was filed in the Court of Appeal, she did not have the sealed order of the High Court. She said that she had the draft order which she included in the supplementary appeal record. Secondly, she replied that this appeal with the draft order was heard by the Court of Appeal on 15 June 1995 before another panel with no objection from the respondent's solicitors and that at that stage, it was still her appeal. At that juncture, the court adjourned the hearing of motions to a date to be fixed because of time constraints to hear other appeals fixed for that week.

It is plain to us that hearing of the appeals proper had not started yet on 2 August 2001 and that Miss Kannaperan had not completed her submission on the motions.

The abovenamed appeals were fixed for hearing again before us in the week commencing from 28 April 2003. We started with MRRS No: W-02-457-98 and the court pronounced and recorded thus:

> As my learned brother judge Datuk Saari will soon retire from the Bench and as we have not started hearing this appeal at all, it is desirable that this appeal be adjourned to another date without involving him. Adjourned to a date to be fixed.

On 30 April 2003, we returned to deal with the three motions of the appellant part heard on 2 August 2001.

On encl. (15a) of MRRS No: B-02-255-94 it was recorded thus:

Yusuf Khan: The motion encl. (15a) is unnecessary because para 4 of her Affidavit in support states:

> Saya mengesahkan bahawa Rekod Rayuan yang difail disini mengandungi salinan meterai Perintah yang bertarikh 8hb Oktober 1994

in the light of *Megat Najmuddin*'s case, a Federal Court decision. I reserve my preliminary objection for the hearing of this appeal on merits.

Kannaperan: I withdraw my motion on the ground that it was unnecessary as Khan stated and wish this to be recorded.

Ct: Motion at encl. (15a) struck out.

Khan: I am not asking for costs.

Next and on the same day the court proceeded to hear the motions encl. (12a) in MRRS No: B-08-183-95 and encl. (51a) in B-02-132-95 and it was recorded thus:

(7) High Court order dated 30.1.95 – order of intervention.

Khan: This motion at encl. (51 a) concerns order dd. 27.4.95 which is not the subject of appeal in B-02-132-95. The subject matter of appeal in B-02-132-95 is the intervention order dd. 30.1.95. This order has already been disposed of by the F.C. The order of consolidation dated 5.6.95 was made by the Court of Appeal and any application as in the present case ought to be made under that consolidated file under B-02-132-95 (ie. to 132, 183, 138 and 228).

Ct: Motions at ends. (12a) and (51a) dismissed with costs to the Respondent. Costs to be apportioned equally between the Appellants. Appellants at liberty to file one set of A/R under B-02-132-95 in compliance with order of the F.C. dd. 5.8.97 in FCCA No: 02-08-1996(8) and orders of C.A. dd. 12.5.95 and 5.6.95 made in B-02-138-95 and B-02-228-95. Direct Mr. J. Singh to extract the C.A. orders dd. 12.5.95 and to obtain sealed copies and serve on the parties.

Applts to file and serve the A/R on the Resp within 14 days from date of service of sealed order dd. 12.5.95.

On 2 May 2003, the court recalled the parties with a view to formally adjourn the hearing of the appeals proper in B-02-255-94, B-08-183-95, B-02-132-95 and B-02-228-95. Mr Khan took the opportunity at the commencement of the hearing to ask the court to vacate that part of the order made on 30 April 2003 which directed J. Singh to extract the orders of consolidation and to file and serve the appeal record on the respondent within 14 days from the date of service of sealed orders dated 12 May 1995.

Mr. Khan submitted that such a direction had the effect of:

(a) transforming an irregular appeal record into one that is proper and regular;

(b) compromising the respondent's right to raise preliminary objection to all appeals in their original status;

(c) touching on the appeals proper which this court intimated earlier that it would not do.

He further submitted that if such a direction was vacated, it would not prevent Mr. J. Singh nor the appellant from taking remedial action to ensure that proper appeal records were before whichever panel hearing the appeals. The vacation of this direction would not prevent Mr. J. Singh nor the other appellant from taking the necessary steps in those appeals proper to rectify the appeal records, he clarified. On the other hand, if the direction was not vacated, he submitted that it would stand in conflict with the court's earlier intimation that encls. (12a) and (51a) were to be heard without affecting the appeals proper nor the preliminary objections relating to those appeals. Secondly, he submitted that if not vacated, such a direction would compromise the preliminary objections which the respondents intend to take in those appeals. Thirdly, he submitted that the direction complained of stood in the way of the proposed adjournment of the four appeals. Lastly, he indicated that he made the application to vacate such direction on the basis that he was before the same panel that made the order and direction on 30 April 2003. Since the order had not been perfected, he was entitled to re-open the issue and to seek that such direction be vacated and that as authorities stand, any order not yet perfected, could be vacated by the court.

Miss Kanaperan submitted that:

(1) encls. (12a) and (51a) are applications for leave to file supplementary appeal records. They were first heard on 9 August 2001 and fixed for continued hearing on 30 April 2003.

(2) encls. (12a) and (51a) were applications to introduce certified true copies of the High Court order dated 27 April 1995.

(3) after hearing submissions, this court ordered the dismissal of encls. (12a) and (51 a) and ordered that the appellant file one set of the appeal record in B-02-132-95 in compliance with the Federal Court order dated 5 August 1997 in MPRS No: 02-08-1996(6) and the Court of Appeal orders in B-02-138-95 and B-02-228-95 dated 12 May and 5 June 1995 respectively.

(4) the order of this court dated 30 April 2003 had been made and encls. (12a) and (51a) had been disposed of and no basis had been shown for that order or any part of it to be vacated.

Mr. J. Singh respectfully adopted the submission of Miss Kannaperan.

Mr. Khan replied that his basis was that the court order of 30 April 2003 had not been perfected. Otherwise, the four appeals would be left hanging in the air.

The dispute raised by Mr. Khan was limited only to that part of the order of this court made on 30 April 2003 which directed Mr. J Singh to extract the Court of Appeal order dated 12 May 1995 and to obtain sealed copies and serve on the parties. Appellants to file and serve the appeal record on the respondent within 14 days from the date of service of the sealed order dated 12 May 1995.

The complaint of the respondent could be further narrowed down to only that part of the direction which directed the appellants to file and serve the consolidated appeal record on the respondent within 14 days from date of service of the sealed order dated 12 May 1995. This part of the direction related back to the order of the Federal Court dated 5 August 1997 referred to earlier on in this court order made on 30 April 2003. The relevant operative part of the said Federal Court order reads:

> ... DAN ADALAH DIPERINTAH SELANJUTNYA bahawa Rayuan Responden ke Mahkamah Rayuan di dalam Rayuan Sivil B-02-132-95, B-02-183-95, B-02-138-95 dan B-02-228-95 ini diserahkan balik ke Mahkamah Rayuan bagi perbicaraan atas kesemua isu-isu yang berada di hadapan Mahkamah Rayuan dalam Rayuan-Rayuan Sivil No. B-02-132-95 disatukan bersama B-08-183-95 dan B-02-138-95 disatukan bersama B-02-228-95 termasuk penggunaan budibicara Mahkamah kecuali atas isu bidangkuasa di bawah Aturan 15, Kaedah 6, Kaedah-Kaedah Mahkamah Tinggi 1980 ...

So far as the consolidation of these appeals, that was ordered by the Federal Court on 5 August 1997. That order was of course binding on the parties and also on the Court of Appeal. See, in this regard, the duty of loyalty upon the CA and the reminder of the FC to the CA of those principles in *Co-operative Central Bank Ltd. v. Feyen Development Sdn. Bhd* [1997] 2 MLJ 829 at

pp. 829I-830A per Edgar Joseph Jr. FCJ; See further the more recent repeat reminder to the CA by the FC in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi a/l K. Perumal* [2001] 2 CLJ 525 (FC) per Abdul Malek Ahmad FCJ. The fact remains that on both occasions that these appeals came before this same panel initially, on 2 August 2001 and latterly, on 28 and 30 April 2003 and on 2 May 2003, no consolidated appeal record was prepared. Instead, separate appeal records were before us. Mr. Khan pointed this out to us. Obviously, there was non-compliance with the Federal Court order. We could not therefore proceed to hear these appeals on the merits. Further, there was the time factor in view of Datuk Saari about to go on retirement next June and Dato' Alauddin about to leave for overseas. Consequently, we reiterated compliance with the Federal Court order and directed filing and service on the parties. In the circumstances it was obvious to us that hearing on the merits of these appeals could not commence and had to be adjourned until the consolidated appeal record had been filed and served as we so directed.

To our minds, the point taken by Mr. Khan was procedural in nature in that it relates to the filing and service of the consolidated appeal record and the objection likely to be taken by him was purely technical. The consolidated appeal record, its filing and service, were steps necessary and proper to give effect to the Federal Court order which as said before was binding on all parties and the Court of Appeal.

Bearing in mind rr. 1A, 3A and 102 of the RCA and judgment of the Federal Court in *Megat Najmuddin b. Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645 per Mohtar Abdullah FCJ we remain steadfast that the direction complained of should not be vacated. We affirm such direction accordingly.

Hearing of the appeal Nos: B-02-255-94, B-08-183-95, B-02-132-95, B-02-138-95 and B-02-228-95 consolidated by the Federal Court order are hereby adjourned to a date to be fixed.